In The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CALIFORNIA FRUIT CANNERS' ASSOCIATION, a Corporation (plaintiff),

Plaintiff in Error.

vs.

CHARLES H. LILLY, doing business as C. H. LILLY & COMPANY (defendant),

Defendant in Error.

No. 1863

UPON WRIT OF ERROR TO UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

THOMAS, GERSTLE, FRICK & BEEDY,
WILLIAM H. GORHAM,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

The original complaint in this case contained two causes of action: one, on an unpaid balance of an account

for goods, wares and merchandise sold and delivered by plaintiff in error (plaintiff below) to defendant in error (defendant below) under contracts set out in full; and the second cause of action, on an account stated in writing between plantiff and defendant upon which a balance (in the same amount as in the first cause of action) was found due from defendant to plaintiff which defendant agreed in writing to pay, but which defendant had failed to pay.

On motion of defendant the court entered an order, over the objection of plaintiff, requiring the plaintiff to elect upon which cause of action in the complaint it would sue; whereupon an amended complaint was filed containing the cause of action on the account stated as set forth in the second cause of action in the original complaint.

Before issue was joined the defendant demanded and plaintiff furnished a copy of the account stated and of the agreement to pay the same. (Record, pp. 36, 37, 38 and 39.)

The defendant filed his answer denying the account stated and agreement to pay; setting up as affirmative defense that he had been induced by fraud of plaintiff to agree to pay for certain goods plaintiff had represented it had stored in warehouses subject to defendant's order; and setting up as a second affirmative defense and counterclaim (1) that he had been induced by fraud of plaintiff to agree to pay for certain goods plainti ffhad repre-

sented it had stored in warehouses subject to defendant's order; (2) that plaintiff had confessed that the goods were not of the grade or quality represented to defendant; and (3) had agreed to remedy defect and reimburse defendant damages or injury caused thereby; but (4) had failed to comply with its said agreement; and (5) that defendant, before discovering that the goods were not up to quality, had received and paid for a large quantity of the goods; and (6) had sold and distributed the same to his customers representing them of grade and quality represented by plaintiff; (7) that subsequent to rendition of the account by plaintiff to defendant, as claimed by plaintiff, the goods were repudiated by defendant's customers and in many instances returned to defendant; (8) that defendant's customers refused to pay for the same; and (9) that in consequence thereof and by reason of the deficiency of grade and quality of the goods defendant had been damaged, in the amount of which damages he prayed judgment against plaintiff.

The plaintiff's reply denied each and every allegation contained in the first and second affirmative defense and counterclaim.

Subsequent to issue being joined and at a time prior to the trial, the depositions of S. L. Goldsmith, W. F. McMillin and others, witnesses on behalf of plaintiff, were taken in support of the allegations of the amended complaint as to the account stated and the agreement

to pay, the balance found due thereby, and the non-payment thereof.

At the trial the depositions were read in evidence and the exhibits attached to the depositions offered and received in evidence.

At the trial the order of reading the deposition of Goldsmith and McMillin, and offering Exhibit No. 2 (the account stated) in evidence, was as follows:

1. Direct examination of Goldsmith.

2. Direct examination of McMillin.

3. Exhibit No. 2 (account stated) offered and received in evidence (Record, p. 93).

4. Cross examination of McMillin.

5. Cross examination of Goldsmith. (Record, p. 76.)

The depositions of plaintiff's witnesses, together with Exhibits Nos. 1, 2, 3 and 4, excluding Goldsmith's cross examination, tended to show, sufficiently to go to the jury.

(a) Transactions between the parties upon which an account stated could be based;

(b) An account stated in writing between the parties upon which a balance was found due from defendant to plaintiff;

(c) An agreement in writing on the part of defendant to pay plaintiff that balance;

(d) A failure of defendant to pay that balance.

The cross examination of Goldsmith, read and admitted in evidence at the trial by the court over the objection of plaintiff, tended to show: that the goods in question were stored in warehouses until payments were made by defendant; that they were stored in stacks, stacked in large stacks; there were a good many thousand cans; that as orders came in they were labeled, cased and shipped, and in the meantime they were in stacks; that the goods were stored in stacks with other goods; that the goods belonged to the plaintiff and were the property of the plaintiff and were stored for account of defendant until they were paid for.

This testimony of Goldsmith, on cross examination tending to this showing, was elicited in response to questions propounded by defendant touching particular items of the account stated, Exhibit No. 2, which at the time of such cross examination had been identified by Goldsmith but had not been offered or received in evidence and concerning which particular items or the goods they related to, Goldsmith had not been interrogated on his direct examination.

At the close of the reading of the depositions, and the offering and reception of Exhibits Nos. 1 to 5, inclusive, in evidence, the plaintiff rested; whereupon defendant

moved to strike the testimony contained in the depositions, which motion was denied by the court; whereupon defendant moved for a non-suit, which was granted, and the jury was discharged from further consideration of the case.

Thereafter a petition for a new trial was interposed by plaintiff and denied by the court; whereupon upon motion of defendant a judgment of dismissal was entered by the court dismissing said cause.

The plaintiff brings error to this court.

ASSIGNMENT OF ERRORS.

The following is the specification of errors upon the part of the Circuit Court relied upon, alleged and intended to be urged upon this appeal.

I.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?

To which the witness answered:

A. Those goods belong to the California Fruit Canners' Association and are stored in the warehouse until payments are made by Lilly & Company.

To which ruling of the court the plaintiff excepted.

II.

The court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Then is that the case with each item of merchandise on that statement?

To which the witness answered:

A. You are speaking of the warehouse goods?

To which counsel for defendant replied: Yes, sir.

To which the witness answered:

A. These goods were charged to Lilly & Company and held for payment.

To which ruling of the court plaintiff excepted.

III.

The court erred in overruling plaintiff's objection as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Then your statement that the goods did not belong to Lilly & Company, but were stored until paid for by them, is that or is that not correct?

To which the witness answered:

A. I said the goods were charged to Lilly & Company and they are not their property until they are paid for.

To which ruling of the court plaintiff excepted.

IV.

The court erred in overruling plaintiff's objection as not proper cross-examination and as calling for a conclusion of the witness to the following question propounded by defendant to the witness S. L. Goldstein, on cross-examination:

Q. None of the merchandise items, then, on this statement is the property of Lilly Company.

To which counsel for defendant added the further question:

Q. Is that what I am to understand?

To which the witness answered:

A. As I said before, they are stored for Lilly & Company until payments are made.

To which ruling of the court plaintiff excepted.

V.

The court erred in overruling plaintiff's objection, as not proper cross-examination and as calling for a conclusion of the witness to the following question propounded by defendant to the witness S. L. Goldstein as cross-examination:

Q. Stored how, as security for the payments—for the accounts?

To which ruling of the court plaintiff excepted.

VI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question, propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Or as Lilly & Company's property?

To which the witness answered:

A. Stored for account of Lilly & Company until they are paid.

To which ruling of the court plaintiff excepted.

VII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, and it does not appear the witness is qualified to answer the question, to the following question propounded to the witness S. L. Goldstein on cross-examination:

Q. Where were the goods stored?

To which the witness answered:

A. They were stored in one or more of our warehouses.

To which ruling of the court plaintiff excepted.

VIII.

The court erred in overruling plaintiff's objection, as not proper cross-examination to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state which warehouse.

To which the witness answered:

A. I stated in one or more of our warehouses, we have a number of them.

To which ruling of the court plaintiff excepted.

IX.

The court erred in overruling plaintiff's objection, as not proper cross- examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state in which warehouse and the location thereof?

To which the witness answered:

A. I told you in one or more of our warehouses; we have a number of warehouses distributed throughout the State of California.

To which ruling of the court plaintiff excepted.

X.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following ques-

tion propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Read the question. (Last question read.)

To which the witness answered:

A. We have a number of warehouses—

To which ruling of the court plaintiff excepted.

XI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Answer the question.

The NOTARY (Mr. SESSIONS).—Mr. Goldstein, if you know the warehouse in which these goods were stored, please state, and if you do not, please state that you do not.

To which the witness answered:

A. I don't know which particular warehouse.

To which ruling of the court plaintiff excepted.

XII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. How do you know whether they are stored at all anywhere?

To which the witness answered:

A. We reserve a certain amount—when goods are billed up to a customer they are reserved and stored at one or more of our warehouses, and I know that our books are kept correctly and that goods are withheld for customers to whom they may be charged.

To which ruling of the court plaintiff excepted.

XIII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by the defendant to the witness S. L. Goldstein on cross-examination:

Q. Does your books show in what warehouse these particular goods you have been testifying about are stored?

To which the witness answered:

A. That I can't tell.

To which ruling of the court plaintiff excepted.

XIV.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following questions propounded by the defendant to the witness S. L. Goldstein on cross-examination:

Q. Does the statement on the books with which you compared this statement as you have testified to hitherto, show where these goods are stored?

To which the witness answered:

A. That I can't tell.

To which ruling of the court plaintiff excepted.

XV.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly state the names, number and place of your various warehouses?

To which the witness answered:

A. We have two warehouses here.

Mr. GORHAM.—What do you mean by here?

A. San Francisco—shall I state all the warehouses we have?

Mr. GORHAM.—That is the question.

A. One in Oakland, one in San Leandro, one in Healdsburg, one in Santa Rosa, one in Stockton, one in Sacramento, one in Visalia, one in Fresno, one in Hanford, one in Los Angeles, Marysville, Chico—that is all I can remember.

To which ruling of the court plaintiff excepted.

XVI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Kindly give us the location of the two warehouses in San Francisco?

To which the witness answered:

A. One is Francisco and Taylor, the other North Point Street.

To which ruling of the court plaintiff excepted.

XVII. ....

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Have you ever seen these goods in person?

To which the witness answered:

A. These goods are stored in our warehouse.

To which ruling of the court plaintiff excepted.

XVIII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. Well, have you?

To which the witness answered:

A. I might have seen them.

To which ruling of the court plaintiff excepted.

XIX.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to witness S. L. Goldstein on cross-examination:

Q. Then I understand you, you are testifying to the last question as to your custom?

Mr. ALLEN.—Is that correct?

To which the witness answered:

A. Yes, sir.

To which ruling of the court plaintiff excepted.

XX.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. And so far as you know, the usual custom that you just testified to was followed in the case at bar?

To which the witness answered:

A. It is followed in every case.

To which ruling of the court plaintiff excepted.

XXI.

The court erred in overruling plaintiff's objection, as not proper cross-examination, the following question propounded by defendant to witness S. L. Goldstein on cross- examination:

Q. Then are you—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement, Plaintiff's Exhibit No. 2, the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?

To which the witness answered:

A. As I stated before they are stored in stacks.

Mr. ALLEN.—Repeat the question. (Last question read.)

A. I answered the question; all our goods are stored in the stocks until ordered out.

To which ruling of the court plaintiff excepted.

XXII.

The court erred in overruling plaintiff's objection, as not proper cross-examination, to the following question propounded by defendant to the witness S. L. Goldstein on cross-examination:

Q. In answering this last question you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of the California Fruit Canners Association and stored with all their other goods?

To which the witness answered:

A. The property of the California Canners Association and is stored in stacks with other goods.

To which ruling of the court plaintiff excepted.

XXIII.

The court erred in granting the motion of defendant for a nonsuit to which ruling of the court the plaintiff excepted.

XXIV.

The court erred in making, rendering and entering the order and judgment of dismissal, of date January 27, 1910, to which order and judgment plaintiff excepted.

XXV.

The court erred in granting defendant's motion for an order requiring the plaintiff herein to elect upon which cause of action set forth in its complaint it would sue on, and that after the plaintiff should have made such election that the other cause of action be stricken from the complaint, to which ruling of the court plaintiff excepted.

XXVI.

The court erred in making and entering its order of August 30, 1909, granting defendant's motion to require

plaintiff to elect as to which of the two causes of action set forth in its complaint it would rely upon, to which order plaintiff excepted.

The proposition of law and fact for which we contend are:

POINTS AND AUTHORITIES.

I.

AN ACCOUNT WAS STATED BETWEEN THE PARTIES.

On April 29th, 1908, plaintiff in error wrote defendant in error, enclosing a statement of account showing that there was due Nineteen Thousand One Hundred Eighty-Five and 87/100 Dollars ($19,185.87).

"S. L. G. K. N. F.

April 29th, 1908.

C. H. Lilly & Co., Seattle, Wash.

Gentlemen: We enclose herewith statement of your account, and must respectfully insist upon your prompt reply with remittance.

You must concede that we have been more than liberal in letting the account stand so long, and we feel that any fair consideration will insure immediate payment.

We are mindful of the unfortunate market conditions which doubtless hindered the sale of these goods, but you must realize that these conditions prevailed throughout the country. We had to pocket a heavy loss on goods packed in anticipation of normal trade in the Winter and Spring, and we cannot afford to let this account run longer. We have obligations to meet, and must insist upon our customers meeting their obligations to us.

Asking the favor of an immediate reply with remittance, we remain, Yours very truly,

CALIFORNIA FRUIT CANNERS ASSN.

Per .....

Treasurer.

PLAINTIFF'S EXHIBIT NO. 2.

STATEMENT.

San Francisco, April 29th, 1908.

California Fruit Canners Association.

M. C. H. LILLY & CO.

Seattle, Washington.

In Account With

CALIFORNIA FRUIT CANNERS' ASSOCIATION.

Nov.	1.	To Mdse., W. H. a-c.	$ 6,000.00	
"	1.	" "	1,200.00	
"	1.	" "	968.75	
"	1.	" "	248.75	
Dec.	5.	To Storage	15.00	
"	5.	"	75.00	
"	31.	To Mdse.	10,699.60	
Jan.	2.	To Storage	87.25	
"	2	"	18.25	
Apr.	1.	"	166.39	
"	24.	"	166.39	
			----------	$19,645.38
Feb.	26.	By claim Feb. 12	4.28	
"	29.	By Mdse. W. H. a-c	842.17	846.45
			----------	$18,798.93
Apr.	29.	To interest bal. to date		386.94

				$19,185.87

To C. H. B. 4-29 Mailed 4-29 (Copy to C. B. C. 3-29-9)

And on May 7th, 1908, plaintiff received a reply dated at Seattle, May 4th, 1908, acknowledging receipt of the letter of April 29th and stating:

"We have your favor of Apr. 29th and in reply beg to say we will endeavor to send you a substantial remittance on this account during the ensuing month. We are badly overloaded on canned goods as you undoubtedly know, and have been endeavoring to make some terms on the goods which you are holding in the warehouse for us, but without success to date."

(Trans. Pages 102-105, Plaintiff's Exhibits Nos. 1-2-3.)

"An account stated is an agreement between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance."

1 *Am. & Eng. Enc. of Law and Practice,* p. 688.

"The meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of account by one party and an acquiescence therein by the other. The form of the acquiescence or assent is, however, immaterial, and may be implied from the conduct of the parties and the circumstances of the case."

Idem P. 693.

In *Henry v. March,* 75 Cal. 566, the action was on an account stated. Plaintiff's witnesses testified that the account was made up and presented to the defendant, who went over it with the expert, and "made no objections whatever to the account," from the time it was presented to him in August, 1881, "until after the suit was brought" on November 25th, 1881.

This was held to be a sufficient acquiescence from which to imply an assent.

The court said (p. 567):

"This was a sufficient acquiescence from which to imply an assent. It seems to be well settled that the assent may be implied. In *Terry v. Sickles,* 13 Cal. 427, the court, per Cope, J., said: 'If the account be sent to the debtor, and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated.' In relation to this subject Judge Story says: 'It is sufficient if it has been examined and accepted by both parties, and this acceptance need not be express, but may be implied from circumstances. Between merchants at home, an account which has been presented and no objection made thereto after the lapse of several posts is treated, under ordinary circumstances, as being by acquiescence a stated account. Between merchants in different countries a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other and no objection is made after several opportunities of writng have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account.' (1 Story's Eq. Jur., sec. 526.). The same rule is laid down by Greenleaf. (2 Greenl. Ev., sec. 126.)"

In *Spellman v. Muehfeld,* (166 N. Y. 245), 59 N. E. 817, Parker, C. J., speaking for the court, said:

"Plaintiff, as receiver of a corporation of which defendant was formerly president, sought to recover upon an account stated. After the testimony was all in, the trial court dismissed the complaint, and the appellate division, in affirming the judgment entered thereon, held that the plaintiff had failed to establish a cause of action. With such determinaton there would be no opportunity for quarrel, provided it was necessary, in order to make out the plaintiff's case, that he should show an express assent to the correctness of the account. The case has heretofore been considered apparently on the theory that one who seeks to prove an account stated assumes that burden. But this is not so, for it is quite suf-

ficient for a party to prove facts from which an assent may be implied, and the cases, with which the reports abound, present nearly, if not quite, as many instances in which the plaintiff has relied upon facts from which it was asked that an assent to the account should be implied as where it was claimed that an express assent had been proved. The rule governing accounts stated arose from the practice of merchants, and was first applied by courts of chancery to merchants only; but after a time it was extended to cases at law. As between merchants at home, an account which had been presented, and no objection made thereto, was, after the lapse of several posts, treated under ordinary circumstances as being by acquiescence a stated account (*Sherman v. Sherman,* 2 Vern. 276); while between merchants in different countries a longer time was given. But, if no objection was made after several opportunities of writing, it was considered an acquiescence. *Willis v. Jernegan,* 2 Atk. 251; *Tickel v. Short,* 2 Ves. Sr. 239. And so when Judge Story came to write upon this subject he said, 'What is a reasonable time is to be judged of by the habits of business at home and abroad.' 1 Story, Eq. Journal, sec. 526. While the rule has been confined in some jurisdictions to merchants, it has in most of the states of this country been extended to all classes; and it is so in this jurisdiction, with the possible exception that the courts have not attempted to lay down any general test by which to determine what constitutes a reasonable time for the retention of an account in order to make it an account stated. In *Lockwood v. Thorne,* 11 N. Y. 170, Judge Parker, writing for the court, asserted the general rule to be that, where an account showing a balance is rendered, the party receiving it is bound within a reasonable time to examine it, and object if he dispute its correctness. If he omit to do so, he will be deemed from his silence to have acquiesced, and will be bound by it as an account stated, in absence of proof of fraud or mistake. In such a case the assent is not expressed, but it is implied from the fact of a retention of the account for a period of time without objection to any of its items. The mere retention of an account without objection for a reasonable length of time is said to *prima facie* establish assent to its correctness by the party receiving it, but this may

be overborne by proof of circumstances tending to a contrary inference. *Lockwood v. Thorne,* 18 N. Y. 285. Therefore, while the proposition is correctly laid down in *Volkening v. De Graaf,* 81 N. Y. 268, that 'an account stated is an account balanced and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance,' nevertheless, in proving an account stated, 'it is not necessary to show an express examination of the respective demands or claims of the parties, or an express agreement to the final adjustment. All this may be implied from circumstances.' *Lockwood v. Thorne,* 18 N. Y. 285, 288. In the same case it is said that: 'An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without other proof.' These authorities were recently approved in *Brake Co. v. Prosser,* 157 N. Y. 289, 51 N. E. 986, and in the course of the opinion, the necessity of an assent being under consideration, it was said, 'It need not be by direct and express assent, but such assent may be implied from the circumstances.' ''

Mayberry v. Cook, 121 Cal. 588.

Auzerais v. Naglee, 74 Cal. 60.

Lockwood v. Thorne, 11 N. Y. 170.

II.

PLAINTIFF MADE A PRIMA FACIE CASE WHEN IT PROVED THE SENDING OF A STATEMENT OF ACCOUNT AND DEFENDANT'S ACQUIESCENCE IN ITS CORRECTNESS AND DESIRE TO MAKE A PAYMENT THEREON.

The answer denied that an account was stated between plaintiff and defendant, and in two affirmative

defences alleged that plaintiff had made certain false representations, with respect to the goods being subject to its order and as to the quality of them. In order, therefore, to establish a *prima facie* case, plaintiff was only required to prove the sending of the account, which, of course, showed that previous transactions of a monetary character had existed between the parties, and defendant's acquiesence in the correctness of the account.

In *Barr v. Lake*, 126 S. W., 755, the court said at p. 757:

"The theory of the law is that an account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. 1 *Am. & Eng. Enc. Law* (2nd Ed.) 456; *Cape Girardeau, etc. R. R. Co. v. Kimmel,* 58 Mo. 83; *Koegal v. Givens,* 79 Mo. 77; *Columbia Brewing Co. v. Berney,* 90 Mo. App. 96; *Burger v. Burger,* 34 Mo. App. 153. In view of the principle thus established, the law forbids an inquiry into the validity of the items composing the original cause of action, which question is merged in the new promise on the stated account, except upon valid grounds affording relief in other contractual matters, such as fraud, accident, or mistake. The very purpose of an account stated is to foreclose matters of dispute with respect to the various items thereof which afford the consideration for the new promise involved in the stated account, and therefore the law forbids an inquiry into the validity of a portion of the items of which the original cause of action was composed unless it be on the grounds of fraud, accident, or mistake. That is to say, the validity of portions of the original account may not be required into under a general denial. *Columbia Brewing Co. v. Berney,* 90 Mo. App. 96; 1 *Enc. Pl. & Pr.,* 89; *Martin v. Beckwith,* 4 Wis. 219; *Warner v. Myrick,* 16 Minn. 91 (Gil. 81); *Moody v. Thwing,* 46 Minn. 511, 49 N. W. 229; 1 *Am. & Eng. Enc. Law* (2nd Ed.) 456."

"An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. Accordingly, an action thereon is not founded upon the original items, but upon the balance agreed to by the parties, and, therefore, it is not necessary in such an action to prove the items of the original account, nor can the items of the original cause of action be inquired into unless ground is laid for opening, falsifying, or surcharging the account."

1 *Enc. L. & P.*, 716 *et seq.*

Green v. Thornton, 96 Cal. 67, 30 Pac. 965.

McCarthy v. Mt. Tecarbe Land Co., 111 Cal. 328, 43 Pac. 956.

Converse v. Scott, 137 Cal. 239, 70 Pac. 13.

Auzerais v. Naglee, 74 Cal. 60.

In *Green v. Thornton,* 96 Cal. 67 (30 Pac. 965), the court said (page 71 et seq.):

"An account stated is defined by Bouvier to be 'an agreed balance of accounts; an account which has been examined and accepted by the parties.' It implies an admission that the account is correct, and that the balance struck is due and owing from one party to the others. And its effect is to establish *prima facie* the accuracy of the items without other proof, and to constitute a new contract on which an action will lie. (*Auzearis v. Naglee,* 74 Cal. 60)."

Samson v. Freedman, (102 N. Y. 699) 7 N. E. 419.

Hunt v. Stockton Lumber Co., (113 Ala. 387), 21 So. 454.

Cross v. Sacramento Savings Bank, 66 Cal. 462; 6 Pac. 94.

Lanier v. Union Mtg. Etc. Co., (64 Ark. 39), 40 S. W. 466.

McKinster v. Hitchcock, (19 Neb. 100), 26 N. W. 705.

Gordon v. Frazer, 13 App. Cas. 382; (D. C.).

In *Dick v. Zimmerman,* (207 Ill. 636), 69 N. E. 754, an action was brought in *assumpsit.* Declaration consisted of the common counts and attached thereto was a copy of the account sued on. Appellee introduced no evidence to prove the items of account, but relied solely on an account stated, and it appeared from his testimony that, at the request of appellant, he had submitted the account to him and that, after an examination thereof, appellant conceded it to be correct and promised to pay it. Appellant, on his cross-examination of appellee, attempted to show the transaction out of which the account arose. to show that the items were not correct; but the court refused to permit him to do so, stating that there was nothing to cross-examine him about except the interviews and the letters.

The court said (p. 755):

"This suit was tried on the part of the plaintiff upon that count of the narr. declaring upon account stated. He testified in his own behalf to interviews with the defendant, in which the account was presented to the defendant, discussed between them, agreed upon as correct, and that in the last of these interviews defendant, agreed to pay the balance shown by the statement of the account, and plaintiff also testified to the writing of three letters by himself to the defendant, copies of which were admitted in evidence, and to other matters tending to show that the defendant received each of the three letters. On cross-examination counsel for defendant sought to ex-

amine plaintiff regarding the correctness of certain items included in the account. The court sustained an objection, saying; 'There is nothing to cross-examine him about except these interviews he has testified to and these letters;' and it is urged that the right of cross-examination was thereby improperly limited, and that, in any event, the remark of the court was improper, for the reason that the jury would conclude therefrom that the only matters for determination in the case were in reference to the interviews and the letters about which plaintiff had testified. The ruling was correct. Plaintiff was not asking to recover upon the original account, but upon the alleged agreement or account stated, by which the amount due was fixed. 'In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The account is founded, not upon the original contract, but upon the promise to pay the balance ascertained.' *Throop v. Sherwood,* 4 Gilman 92.

"Plaintiff had testified only in reference to the interviews, resulting, as he said, in an agreement fixing the sum due, and in relation to the letters, and the cross-examination was properly confined to the same matters. The remark of the court was a terse and accurate statement of the law applicable to the situation, and could have had no prejudicial effect with the jury, because the defendant was afterwards permitted to offer evidence showing the condition of the accounts between the parties on his theory of the case."

III.

THE GIST OF THE ACTION IS THE AGREEMENT TO OR ACQUIESCENCE IN THE CORRECTNESS OF THE ACCOUNT. PLAINTIFF DID NOT NEED TO SHOW THE NATURE OF THE ORIGINAL TRANSACTION.

In *Hale v. Hale*, 86 N. W. 652 (14 S. D. 644), an action upon an account stated, the court said (p. 651):

"As a recovery did not depend upon the various items of indebtedness arising from former transactions, but upon the agreement of the parties subsequently made, and which constitutes an account stated, the court very properly rejected testimony relating to the original subject-matter, and the assignments of error relating thereto are without merit."

In *Jacksonville M. & P. Ry., Etc. Co. v. Warriner*, 16 So. 898, (35 Fla. 197), the court said, in speaking of the evidence as to an account stated, (p. 899):

"It is not necessary in proving an account stated, the gist of which consists in the agreement to or acquiesence in the correctness of the account by the other party, to first show the books of original entry from which the account agreed upon by the parties was made up. The very object in rendering, stating, and settling accounts is to avoid the necessity of making such proof."

Dick v. Zimmerman (supra).

IV.

THE COURT ERRED IN ADMITTING CERTAIN EVIDENCE, HEREAFTER PARTICULARLY REFERRED TO, ELICITED FROM THE WITNESS GOLDSTEIN ON CROSS-EXAMINATION.

S. L. Goldstein was called as a witness on behalf of the plaintiff in error, and, on his direct examination, testified to the folloiwng facts:

That he was treasurer of the plaintiff in error corporation and that, as such treasurer, it was his duty to

forward to customers any large overdue statements, together with a personal letter; that there was in 1908 a custom of the plaintiff in error of keeping carbon copies of all correspondence, and that Plaintiff's Exhibit No. 1 is a carbon copy of the original letter signed by him and sent to C. H. Lilly & Company at Seattle, Washington; that plaintiff in error also had a custom of keeping carbon copies of all statements sent out, and that Plaintiff's Exhibit No. 2 is a carbon copy of the original statement sent to C. H. Lilly & Co., Seattle, Washington; that since the mailing of the account to C. H. Lilly & Company, no payment on the account has been made. (Trans. p 71-75).

On cross-examination of the witness, the defendant was permitted to ask the following questions:

"Does it or does it not mean that you have claimed to have that much merchandise on storage in your warehouse at that date belonging to C. H. Lilly & Company?" (Trans. p. 79).

"Then, is that the case with each item of merchandise on that statement?" (Trans. p. 79).

"Then your statement that the goods did not belong to C. H. Lilly & Company, but were stored until paid for by them, is that or is that not correct?" (Trans. p. 80).

"None of the merchandise items, then, on this statement is the property of Lilly & Company?" (Trans. p. 80).

"Stored how, as security for the payments for the account?" (Trans. p. 81).

"Or as Lilly & Company's property?" (Trans. p. 81).

"Where were the goods stored?" (Trans. p. 81).

"Kindly state which warehouse." (Trans. p. 82).

"Kindly state in which warehouse and the location thereof." (Trans. p. 82).

"How do you know whether they are stored at all anywhere?" (Trans. p. 84).

"Does your book show in what warehouse these particular goods you have been testifying about are stored?" (Trans. p. 84).

"Does the statement on the books with which you compared this statement, as you have testified to hitherto, show where these goods are stored?" (Trans. p. 85).

"Kindly give the location of the two warehouses in San Francisco." (Trans. p. 86.)

"Kindly state the names, number and plan of your various warehouses." (Trans. 85.)

"Have you ever seen these goods in person?" (Trans. p. 86).

"Then are you—am I to understand that you are testifying that in the case referred to—merchandise referred to in the statement—Plaintiff's Exhibit No. 2—the goods were never segregated and stored separately and distinctly from other goods as the goods of C. H. Lilly & Company?" (Trans. p. 88).

"In answering this last question, you mean to infer that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of the California Fruit Canners' Association and stored with all their other goods?" (Trans. p. 88).

The plaintiff objected to all of these questions on the ground that they were not proper cross-examination, and it is now most earnestly contended that the action of the trial court in overruling these objections was error.

It will be noticed that the testimony of this witness on direct examination was strictly limited to the identificaton of the correspondence passing between the parties, which it is claimed constitutes the account stated, and to the question of payment. Yet the defendant was permitted to cross-examine the witness in detail as to the transactions on which the account is based; namely, as to the title in the goods, whether the goods were actually in warehouse, what warehouse they were stored in, and the method of storage—matters not even remotely connected with any fact or circumstance elicited on direct examination.

V.

CROSS-EXAMINATION MUST BE STRICTLY CONFINED TO FACTS AND CIRCUMSTANCES CONNECTED WITH MATTERS UPON WHICH THE WITNESS HAS TESTIFIED IN HIS DIRECT EXAMINATION.

This rule is now firmly established in the Federal Courts and has the support of practically all state courts and text book writers. It was first announced as a Fed-

eral rule of evidence by Justice Story in rendering the opinion of the court in the *Philadelphia & Trenton Railroad Company v. Stimpson*, 10 Peters 448, at p. 461:

"Upon the broader principle, now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."

A similar doctrine is announced in *Houghton v. Jones*, 17 L. Ed., where the court says (p. 505):

"It appears that the subscribing witness to the deed introduced was present in court during the trial, and was examined with reference to certain matters, but not touching the execution of the deed. The defendant thereupon claimed the right to cross-examine him with reference to such execution. The court held that the defendant must, for that purpose, call the witness, and could not properly make the inquiry upon the cross-examination. In this particular the ruling of the court below was correct. The rule has been long settled, that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to examine him as to other matters he must do so by calling the witness to the stand in the subsequent progress of the cause."

The reason of the rule and the reasoning upon which it is based are very fully and forcibly set forth in *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 Federal 668, in the following manner (p. 674):

"In the courts of the United States the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct ex-

amination, and a voilation of this rght s reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on the direct examination, he must call him in his own behalf. (Citing numerous authorities.)

The reason of the rule is that a witness during his cross-examination is the witness of the party who calls him, and not the witness of the party who cross-examines him. *Wilson v. Wagar,* 26 Mich. 457, 458; *Campau v. Dewey,* 9 Mich. 417, 418. The cross-examiner has the right to bind his opponent by the testimony of the witness upon cross-examination relative to every subject concerning which his opponent examined him in the direct examination. But he has no right to bind his opponent by the testimony of the witness during the cross-examination upon subjects relative to which his opponent did not inquire. If the cross-examiner would investigate these subjects by the testimony of the witness, he may and he must make him his own witness, and stand sponsor for the truth of his testimony. It is discretionary with the court to permit the cross-examiner to do this at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. But in the Federal Courts the line of demarcation which limits a rightful cross-examination is clear and well-defined, and it rests upon the reason to which attention has been called. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify. It exists because within that line the party who calls the witness stands the sponsor for the truth of his testimony, while without that line he does not. It does not vary, at the discretion of the court, with any convenience or necessity of court or counsel, because no conveniences or necessity can be conceived of which would not enable the cross-examiner to make the witness his own, and because to subject the rule to the discretion of the court or counsel is to abrogate it."

The numerous authorities cited in this case show plainly the general acceptance of this rule, and, in addition to the cases there cited, we desire to call the attention of the court to the following authorities and the numerous cases cited by them as clearly supporting the doctrine:

Jones on Evidence, Sec. 820.
Enc. of Evidence, Vol. 3, p. 822.
Wills v. Russell, 25 L. Ed., 608.
McKnight v. United States, 122 Fed. 926.
Bertleson v. Hoffman, 77 Pac. (Wash.) 801.
Ashborne v. Town of Waterbury, 37 Atl. (Conn.) 498.
Stone v. White, 450 So. (Florida) 1032.
Tourelotte v. Brown, 29 Pac. (Colo.) 130.

The attention of the court is directed to the fact that not only were the questions objected to not germane to any matter brought out on direct examination, but they were particularly vicious in that they were directed to what, if properly pleaded, would have constituted an affirmative defense; namely, that there was no consideration for the payment of the account because the title to the goods had never passed to the defendant. To this state of facts, the rule above set forth is particularly applicable. *Jones on Evidence*, p. 1039:

"This rule clearly applies when the attempt is made to draw out, by cross-examination, facts having no connection with the matters stated in the direct examina-

tion, but constituting the *substantive defense or claim of the cross-examiner.* For example, if the direct examination of the payee of a note is confined to the question of the genuineness of the signature or the identity of the note, the adverse party has no right to cross-examine as to the consideration; and in ejectment, the plaintiff's witnesses cannot, on cross-examination, be examined as to the defendant's title. So in an action on a guardian's bond, when the plaintiff's witness does not testify upon the subject, he cannot be cross-examined to show that the bond was not duly executed."

The case of *McCrea v. Parsons,* 112 Fed. 917, is very similar to the case at bar. That was an action on an account stated. brought by the partnership of E. M. Parsons & Sons to recover the sum of $9,476.50. The defendants pleaded the general issue and three special defenses, all substantially to the effect that the transactions upon which the account was based were illegal and void as gaming contracts. The following is from the opinion of the court (p. 919):

"At the trial E. M. Parsons, one of the plaintiffs, called as a witness for the plaintiffs, identified the stated account upon which suit was brought, and said that he received it from the defendants at the time stated. It was thereupon admitted by the defendant McCrea that the account was drawn from the defendants' books and sent by them through the mail to the plaintiffs about April 1, 1899. The direct examination of the witness was confined to the identification of this account. Upon cross-examination he was asked: 'What was the nature of these transactions? Did you ever intend any delivery?' The question was objected to, and the objection sustained, and, we think, correctly. The question was not then proper. A cross-examination should be confined to the subject of the examination in chief. The question went to the defense of illegality of the

transaction, which was an affirmative defense. The witness was not recalled by the defense. The question was not proper upon cross-examination."

In *Braly v. Henry*, 77 Cal. 324, on an action on a promissory note, it was held that where the witness had given no evidence on his direct examination relating to the consideration for the note, it is not proper cross-examination to ask him questions for the purpose of showing that the note was without consideration.

Another case which, by reason of analogous facts, very closely resembles the case at bar is *Youmans v. Carney*, 23 N. W. (Wis.) 20. The facts and the ruling of the court are set forth in the opinion (p. 20):

"The payee of the note was examined as a witness in behalf of the plaintiff. After she had testified, in effect, that the defendant had executed the note; that she had written the body of the note at her mother's house, and then dated it in the defendant's office, at the same time he signed it, she was asked, on cross-examination, this question: 'How came you to write up a note for a thousand dollars? Answer. It was given by him in settlement of a suit.' The plaintiff's counsel objected, in effect, that he had simply proven the signature to the note, but had given no evidence of the consideration therefore except *prima facie* evidence furnished by the note itself, and that theb urden was on the defendant to contradict such evidence, or show the want of it. The court then stated: 'I do noth think it is proper now. That is a matter of defense.' The defendant's counsel then remarked: 'I apprehend we are at liberty to go into the whole *res gestae*.' To this the court responded, in effect, that it was not necessary for the plaintiff's case toprove the consideration of the note, and that it was improper for the defendant then to go

into that question. To this the defendant excepted, and this ruling is the principal error assigned.

It will be observed that the proposed line of cross-examination was excluded on the ground that it was not only a matter of defense but also improper cross-examination. On her direct examination the witness had given no testimony as to the consideration of the note, and had not, therefore, laid the foundation for being cross-examined on that subject. The plaintiff, relying upon his *prima facie* case made by the introduction of the note and proof of signature, had left the question of consideration, or rather the want of it, as a matter of defense. The defendant could not go into his defense until the plaintiff had rested.

The proposed line of cross-examination did not relate to anything that might have occurred at the time of writing or signing the note, and hence did not pertain to the *res gestae* as suggested by counsel. The only ground upon which the proposed line of cross-examination could possibly have been permissible was by way of discrediting the testimony which had been given by the witness as to the genuineness of the defendant's signature."

The contention that the court erred in allowing the defendant in error to introduce an affirmative defense by cross-examination of the plaintiff's witness as to facts and circumstances not germane to any matter touched upon in the direct examination is supported by the Supreme Court of California in *Haines v. Snedigar,* 110 Cal. 18, a case on all fours with the case now before this court. The complaint in that case was in the ordinary form upon a promissory note. The answer admitted the making of the note, and, as an affirmative defense, pleaded in substance that the note was given

as part payment of a harvester purchased by defendant and warranted to do good work; that thereafter a contract in writing was entered into between the parties, by the terms of which the payment of the note was conditioned upon the vendor putting the harvester in good working order; that the vendor did not put the harvester in order to do good work.

At the trial, plaintiffs' counsel called upon G. W. Haines, one of the plaintiffs, who presented a promissory note and said it belonged to plaintiffs and was signed by defendant, and who also testified that no part of the note had been paid. Against the objection of the plaintiffs, the defendant was allowed to prove by the witness that the written agreement, alleged in the answer, had been entered into by the parties and was allowed, over the objection of the plaintiffs, to introduce the written agreement in evidence. The plaintiffs there rested, and the defendant moved for a nonsuit, that it was shown by the written agreement that the plaintiffs were under a duty to make the machine do good and satisfactory work, and that no evidence to this effect had been introduced. The motion was granted and judgment of nonsuit entered.

The court held this to be reversible error, saying (p. 21):

"The action of the court in admitting the evidence objected to and in granting the nonsuit was excepted to,

and the rulings thereon are assigned as error. We think the court erred in its rulings. The defense set up by the defendant involved the plea of an entirely new and distinct contract, made subsequent to the contract upon which the action was based. It was a plea by way of confession and avoidance, involving new matter to be proven by the defendant. Its allegations are, under our code, to be treated as though denied.

The entire answer is made up of affirmative matter. Whatever was necessary to be alleged therein devolved upon the defendant to prove. But he could not by any recognized rule of procedure offer such proofs until plaintiffs had made their case and submitted it to the court. Plaintiffs called one of their number as a witness. He testified to no single thing that was not admitted by the pleadings, but he was a witness, and as such defendant was entitled to cross-examine him. The limit placed upon cross-examination is so largely within the discretion of the trial court that its action in allowing a wide range to questons upon cross-examination will only be reversed in extreme cases.

The court might, in its discretion, as is often done, permit the defendant to prove by plaintiff's witness when on the stand, the due execution of an agreement important to his defense. This course, treated as a mere matter of convenience, was not open to serious objection. To permit this agreement to be then admitted in evidence was, however, quite a different matter.

It was in effect to inject into the case of the plaintiffs a portion of the defense, and was subversive of known and fixed rules of procedure and violative of the whole theory upon which those rules are founded. The proof of the execution of the written agreement of August 6, 1892, was not proper in cross-examination. and its admission in evidence was error.

Greenleaf, in his work on Evidence, Volume 1, Section 447, after discussing the difficulty of laying down a precise rule in reference to the limit to be placed upon

cross-examination, adds: "A party, however, who has not opened his own case will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party, though after opening it he may recall them for that purpose.' "

In *Borden v. Lynch,* 87 Pac. (Mont.) 609, the court states the rule in the following language (p. 610):

"The plaintiff, being sworn as a witness, identified the mortgage and note, stated that she was the owner of them and that the defendant had not deposited the amount of the note with the county treasurer for her nor paid the same to her. On cross-examination she was asked for what consideration the note and mortgage had been given. Upon objection of her counsel, on the ground that it was not proper cross-examination, she was not permitted to answer. Being a party and having offered herself as a witness, the defendant insisted that he had a right to cross-examinate her as to all the circumstances connected with the execution of the note and mortgage, including the consideration. The general rule in this country is that a witness may be cross-examined as to anything testified to him in chief or connected therewith, but not as to other matters. *Code Civ. Proc.,* Sec. 3376; 3 *Jones on Evidence,* Sec. 820; *Kipp v. Silverman,* 25 Mont. 296, 64 Pac. 884; *Braly v. Henry,* 77 Cal. 324, 19 Pac. 529; *McFadden v. Mitchell,* 61 Cal 148; *Youmans v. Carney,* 2 Wis. 580, 23 N. W. 20; *Bell v. Prewitt,* 62 Ill. 361, *Houghton v. Jones,* 63 U. S. 702, 17 L. Ed. 503. While the rule should be extended rather than restricted in its application, it may not be extended to include matters clearly not connected with the subject-matter upon which examination in chief was held. The plaintiff having been asked only as to whether she was the owner of the note and mortgage, it was not proper on cross-examination to go into questions of consideration or other circumstances connected with the transaction which resulted in their execution, either on the ground that such matters were part of the *res gestae,* or that they were connected with matters deposed to in chief."

The Supreme Court of South Dakota, in *First National Bank of Pierre v. Smith,* 65 N. W. 439, states (p. 439):

"The error referred to was the ruling of the court in sustaining respondent's objectoin to the following question propounded to witness DeLaney on cross-examination: 'Q. If it was put there as a credit on deposit, how long was it before your credit was exhausted in the bank? This was objected to as incompetent, etc., and not proper cross-examination. The objection was sustained, and, we think, properly so. The witness was called by the plaintiff (respondent) simply to prove the signature of the defendants to the note, and the signature of the firm of 'DeLaney Bros.' to the indorsement upon the note. No other questions were propounded to him. The defendants' (appellants') counsel then proceeded to cross-examine the witness as to the consideration received, etc., for the note, and one of these questions was the one now under consideration. The evidence sought to be elicited by the cross-examination was as to a matter pleaded as an affirmative defense to the action, and was not cross-examination of any matter testified to by the witness on his examination in chief. No rule is better settled than that a defendant cannot, on cross-examination, introduce his own affirmative defense, unless the witness has, in his direct examination, been interrogated as to the matters concernng which he is cross-examined. In this case counsel for plaintiff (respondent) had examined the witness as to the signatures only, and no question was asked touching the matter of consideration. Clearly, the defendant had no right, on cross-examination, to go into their affirmative defense. *Wendt v. Railway Co.,* 4 S. D. 476, 57 N. W. 226."

See also *Beans v. Denny,* 117 N. W. (Iowa) 1091.

See also the opinions of the Court in *Dick vs. Zimmersan,* 69 N. E. (Ill.) 754, hereinabove set forth.

The courts of a few states have refused to sanction the rule above set forth, which is known as the "American" or "Federal" rule, and have adopted the "English" or "Orthodox" rule that a witness may be cross-examined on any matter material to issues in the case regardless of the limits of his direct examination; but even in the states where this latter rule has been adopted, the trial court will not be allowed to take the case from the jury where the plaintiff has made a *prima facie* case because of evidence of an affirmative defense not germane to the subject of direct examination elicited on cross-examination of plaintiff's witnesses.

This is illustrated by the opinion of the Supreme Court of Missouri, which has adopted the "Orthodox" rule in the case of *Ayers vs. Wabash Railway Co.*, 88 S. W. (Mo.) 608, where the court says (p. 609):

"In such case, if the plaintiff had by other evidence made out a *prima facie* case, the court could not take it from the jury on account of testimony brought out by defendant in the examination of the plaintiff's witness touching matters that had not been referred to in the direct examination. Such testimony would be the same, in effect, as if the witness had, as in conformity with the federal rule, come down from the stand, and been recalled by the defendant after the plaintiff had closed his case."

VI.

THIS ERROR IN THE ADMISSION OF EVIDENCE WAS [illegible] IN ERROR AND SHOULD WORK REVERSAL OF THE JUDGMENT.

The evidence of the plaintiff in error was closely confined to the necessities of the case, viz: That an account had been rendered to the defendant in error and that he had acquiesced therein.

That this evidence established a *prima facie* case we have already shown by the citation of abundant authority, and there is no pretense here that, in ruling on the motion for non-suit, the court decided otherwise.

By the allowance of cross-examination of the witness Goldstein upon matters in no way touched upon in the direct examination, the defendant in error was allowed to show what, if properly pleaded, would have amounted to an affirmative defense.

Briefly summarized, this evidence is as follows: That the goods covered by the different items of the account belong to the plaintiff in error, and were stored in its warehouse until payment was made by defendant in error; that such goods were not the property of the defendant in error until paid for, but were stored for account of the defendant in error until payment was made; that the plaintiff in error had a number of warehouses in the State of California, and that the witness did not know in which particular warehouse the goods in question were stored; that the witness could not tell whether or not the book with which the statement had compared would show the warehouse in which the goods were stored; that the witness could not say

whether or not he had ever seen the particular goods in question, because all goods of the plaintiff in error were stacked in its warehouses, thousands of cans together, and left in that way until orders came in, when the goods were labelled, cased and shipped; that the goods in question were never segregated and stored separately as the goods of plaintiff in error, but were left in stacks; that the goods referred to in Plaintiff's Exhibit No. 2 were the goods of plaintiff in error and were stored in stacks with other goods (Trans., pp. 79-89).

That it was on this evidence, and this evidence alone, that the court granted the motion for non-suit clearly appears both from the text of the motion and from the oral opinion of the court in support of the order granting the motion.

The motion was made on two grounds:

FIRST—That no obligation was shown upon which the account stated could rest; that there was no consideration or prior transaction back of the account.

SECOND—That the promise to pay the account was conditioned upon the goods being in the warehouse to the order of defendant in error, and that there was no evidence to show that the goods were in the warehouse to his order (Trans., p. 49).

As we have hereinbefore pointed out, it was in no way incumbent on plaintiff in error to go behind the new

obligation implied from the statement of account and show that the account was based on a binding prior transaction, that being a matter of affirmative defense.

Therefore, had the court strictly confined its ruling on the motion for non-suit to the grounds presented in support of such motion, it must have denied the motion for the reason that it was not necessary that the plaintiff in error show any of the facts which it is claimed were not shown.

The second ground for the motion, in addition to being subject to the vice pointed out, is also objectionable as being entirely without foundation in the eivdence, and, we think, may be safely dismissed without further consideration. There is not a single utterance in the opinion of the trial court that would induce the belief that the order granting the motion for non-suit was the result of a failure on the part of the plaintiff in error to prove a material part of its case; but, on the contrary, it clearly and plainly appears that such ruling was based upon the affirmative showing of lack of consideration made by defendant in error on cross-examination of the witness Goldstein.

The full text of the oral opinion of the trial court rendered in granting the motion for non-suit is as follows (Trans. pp. 49, 50, 51):

"An action brought on an account stated is undoubtedly a proper action to bring, and it is an action that has

grown out of the experience of business men, who find that when partners have adjusted their accounts and dismissed matters from their memory, that the balance then ascertained to be due, one way or the other, should thereafter be treated as a definite thing, and they need not take the trouble thereafter to go through again the settlement or adjustment that they have once made.

"Now, the law provides that an account of that kind shall have a definite effect and be considered the basis of a new promise, with the proviso that either party may surcharge it or falsify it by showing that it was the result of fraud or a serious mistake.

"Now, the question in this case is, and the only question there is before the court, is there sufficient evidence here upon which the jury, if the case were to close right now, could find a verdict for the plaintiff which the Court would permit to stand? I do not think there is.

"This account, or this statement of account, which was sent by plaintiff to defendant, is the ordinary method or disclosed the ordinary method of stating an account for goods sold and delivered. It says 'to merchandise,' and then followed by several items of storage. Now, the uncontroverted evidence here shows that no sale of merchandise ever took place. The parties, both parties, probably thought that what was done amounted to a sale —at least the plaintiff thought so. The defendant thought a sale had taken place, and his letter upon which the adjustment of account really is based, speaks of the goods being held or carried in warehouse—being 'held in warehouse for us.'

"Now, it is plain, under the authorities, that the property in these ogods never passed to the defendant, consequently no action for goods sold and delivered could be maintained.

"Now, could this action be maintained, or could the case be submitted to the jury on the theory suggested by the Court a few minutes ago, that the parties may have

expressly stipulated that the goods were to remain the property of the plaintiff and were to remain in the general mass of the plaintiff's property until the defendant called for them. Now, that would be an extraordinary contract. I am not clear whether the principles of an account stated could apply to an executory contract or series of executory contracts.

"Assuming that the principles might so apply, this would be the result: I do not think that stating the account, that is, striking a balance, would change the nature of the undertaking between the parties. If there were executory contracts the plaintiff could not recover the purchase price without going through the formality, at least, of tendering the goods. It is true the circumstances might be such that a tender would take place by merely segregating the goods from the general mass in the plaintiff's own warehouse, but there would have to be something in the nature of a tender, some endeavor to pass the property to the buyer before an action could be maintained for the purchase price.

"So it seems to me that even if the principles of an executory contract apply to an account stated that the plaintiff has not shown a liability. Undoubtedly the plaintiff may maintain an action, if it has contracts, and I assume that it has, and if they have been violated by the defendant the plaintiff may maintain an action for such violation; but on the basis of an account stated it seems to me that the proof has negatived the liability asserted for the reasons that I have already stated.

"The motion for a non-suit will therefore be granted."

The keynote to the opinion of the court is found in this sentence: *"Now, the uncontroverted evidence here shows that no sale of merchandise ever took place."* The theory of the court must have been that, inasmuch as the title in the goods had never passed to the defendant

in error, the action on the account stated must fail, for the reason that it was shown that there was no consideration for the statement of such account. No other conclusion is possible from the language employed in the opinion. Now "the uncontroverted evidence" upon which the trial court relies to support this theory is the evidence of the witness Goldstein, given on cross-examination in answer to the questions objected to by plaintiff in error. That it is on this evidence alone clearly appears, for there is not a single word of other evidence in the transcript, uncontroverted or otherwise, which in any way relates to the transactions anterior to the statement of account except this same evidence of the witness Goldstein.

Thus the trial court not only admitted evidence which was improper, but it went further and based its ruling on the motion for non-suit on that very evidence. The admission of this evidence was, therefore, in the highest degree prejudicial and injurious to plaintiff in error; and for the error committed in so admitting it, this court should grant a new trial.

While the Appellate Courts are always disposed to concede something to the discretion of the trial court in the question of the latitude to be allowed on cross-examination, they have uniformly held that, where evidence improperly admitted on cross-examination works serious injury to the opposite party, a new trial will be granted.

The case of *Haines vs. Snedigar,* 110 Cal. 18, referred to above is in point. In that case, as in the one now before this court, the trial court allowed evidence of an affirmative defense on cross-examination and, basing its evidence on the ruling so admitted, granted a nonsuit to defendant. This the Supreme Court of California held was reversible error.

In *O'Connell vs. Pennsylvania Co.,* 118 Fed. 989, the Circuit Court of Appeals, Sixth Circuit, in considering the question of whether or not a new trial should be granted because of the error here complained of, said, per Lurton, Circuit Judge, (p. 991):

"All this was objected to by the plaintiff in error as not legitimate cross-examination, but evidence in chief. It was, however, admitted, over objection, as proper cross-examination. This statement as to the condition of the step on the car examined by the witness was plainly evidence in chief. The witness should have been recalled if the defendant so desired, and thus made the witness of the defendant as to the condition of the step of the car he had identified by number and name as the car from which plaintiff fell."

Citing—

Montgomery v. Insurance Co., 97 Fed. 913; 38 C. C. A. 553, 557.

Willis v. Russell, 100 U. S. 621, 625; 25 L. ed. 607.

Houghton v. Jones, 1 Wall. 702, 706; 17 L. ed. 503.

"The cases cited above are all cases where the trial court had properly applied the rule limiting the cross-examinationg to the matters opened up by the examina-

tion in chief, and in *Willis v. Russell*, the court calls attention to the fact 'that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury.' 'Cases,' said the court, 'not infrequently arise where the convenience of the witness, or the court, or the party producing the witness will be promoted by a relaxation of the rule to enable the witness to be discharged from further attendance; and if the court, in such a case, should refuse to enforce the rule, it clearly would not be ground of error, unless it appeared that it worked serious injury to the opposite party.' While we are dispased to concede to a trial judge wide limits in the suspension or enforcement of the rule in reference to the proper limits of a cross-examination and in respect to the order in which evidence is to be introduced, yet we must reserve to this, as a reviewing tribunal, such authority in respect to even such questions of practice as that any serious injury to the rights of the party complaining of the relaxation of the rule may be corrected by granting a new trial, if necessary. In the instance before us the case turned upon the question as to whether the plaintiff's injury was due proximately to a defective appliance. Without having asked the witness Forney a single question in respect to this matter, the defendant was permitted to affirmatively show that no such defect existed as that claimed by the plaintiff. A consequence was that, upon this very affirmative evidence, the defendant, at the close of plaintiff's evidence, asked and obtained a direction to find for the defendant in error. This verdict was directed, as is shown by the charge of the court, upon the ground that this positive evidence, delivered by Forney, that the step was not defective, was not so contradicted by the evidence of other witnesses as to make a case for the jury. We are not prepared to say that in this particular instance the suspension of the usual and proper rule in regard to the limits of a cross-examination did not operate to the very serious injury of the plaintiff's case. Certain it is that no reason appears which appealed to the discretion of the tral judge. Inasmuch, however, as the case must be

reversed upon other grounds, we reserve the question as to whether the action of the court in this instance would, independent of any other ground, be reversible error."

In *Bowsher v. Chicago, B. & Q. R. Co.,* 84 N. W. (Iowa) 958, the action was brought to recover for damages sustained by plaintiff by reason of his wrongful ejectment from one of the defendant's trains. Plaintiff had failed to procure a ticket, and, on the demand of the defendant's conductor for the payment of ten cents additional to the usual fare, refused to pay the same, stating to the conductor the reasons why he had not procured a ticket. Notwithstanding these reasons, he was ejected from the train and brought this suit, and, on trial of the action, recovered a verdict of $405.00.

The judgment was reversed on appeal, and, as appears from the opinion of the court, the reason of this reversal was the improper admission of evidence injurious to the defendant on cross-examination.

"The conductor was called and examined by the defendant, and on cross-examination was asked if he had not, in the year 1897, carried J. H. McVey from Bethany Junction to Lamoni at least 25 times, to which defendant's objection as immaterial and not proper cross-examination was overruled. The witness answered, 'I don't think I have carried him that many times without his paying train fare.' He was asked if he had ever demanded 10 cents extra from W. H. Spurrer prior to March 9, 1897, which was objected to for the same reason, the objection overruled, and the witness answered to the effect that he always demanded the 10 cents extra, unless the company was to blame for the passengers not having a ticket. This evidence was not as to any matter called

out on the examination of this witness in chief, and was, therefore, not proper cross-examination. We think the objections should have been sustained. See *Sherman v. Railroad Co.,* 40 Iowa, 45; *Stone v. Railroad,* 47 Iowa, 83. The same is true as to the cross-examination of this witness as to one Bradley having been injured by passing under the gang plank used in transferring mail and baggage. This evidence was manifestly prejudicial to the appellant.''

A careful examination of this case discloses the fact that, although numerous errors were assigned, the error in the admission of evidence on cross-examination was the only one upheld by the Appellate Court and that, on this ground alone, a new trial was granted.

It is respectfully submitted to this court that the evidence herein complained of was improperly admitted, that it clearly appears that the ruling of the trial court granting the motion for non-suit was based exclusively on this evidence, that the admission of such evidence was, therefore, manifestly prejudicial and injurious to the plaintiff in error, and that this court should, consequently, grant a new trial.

Further, the defendant, by seeking to recover, in his counterclaim, damages for fraud and breach of warranty under the original contract for the sale of goods, had affirmed that contract as an executed contract.

The defendant's answer to the amended complaint consideration of which and rely upon such representations on part of plaintiff with intent to cheat and de-

fraud defendant, as to quantity and quality of goods stored in warehouses subject to defendant's order, in consideration of which no relying upon such representations defendant agreed to pay the value of said goods; that thereafter defendant discovered the falsity and untruthfulness of plaintiff's representations known by plaintiff to be false and untrue; that plaintiff confessed to defendant that the goods were not of the grade or quality represented to defendant and agreed to remedy the defect and reimburse defendant for any damages or injury caused defendant by reason of such deficiency in quality; and that plaintiff failed to keep said agreement. (Record, pp. 24 and 25; Par. III, IV, and V of Answer.)

The defendant's answer to amended complaint alleges in its second defense and counterclaim all of the allegations contained in its first affirmative defense and further alleges that defendant before discovering the goods were not up to quality received and paid plaintiff for a large quantity of said goods and sold and distributed the same to his customers representing to the customers that the goods were of the grade and quality as represented by plaintiff to defendant.

That thereafter and *subsequent to the rendition of the account by the plaintiff to defendant* AS CLAIMED BY PLAINTIFF, said goods were by his customers repudiated and in many instances returned to defendant; that defendant's customers refused to pay for the same

and that in consequence thereof and by reason of deficiency of grade and quality of said commodities the business of defendant had been damaged in the sum of $25,000, in which amount defendant prayed judgment against plaintiff. (Record, pp. 26, 27; Par. III, IV, V and VI of 2d Defense in Answer.)

The defendant alleged not only fraudulent representations on the part of plaintiff, inducing defendant to agree to pay for the goods in the original contract for sale, but a breach of warranty of the contract as an executed contract and damages sustained by the fraud and breach of warranty.

On this state of facts defendant had a choice of remedies, either to rescind the original contract for the sale of the goods, restore what he had received thereunder and recover back what he had paid or to affirm the contract, recover damages sustained for fraud alleged and those alleged as resulting from breach of warranty.

A vendee who has been induced by fraud of his vendor to make a contract of purchase, which contains warranties made by the vendor, has a choice of remedies. He may rescind the contract, restore what he has received and recover back what he has paid, or he may affirm the contract, recover the damages he has sustained for the fraud, and also those resulting from a breach of the warranties, but he cannot do both.

Wilson v. New U. S. Cattle Ranch Co., 73 Fed. 994, 8th C. C. A.

"The difference between the two actions is not merely technical; in substance they are as far apart as affirmance and repudiation."

Cheney v. Dickinson, 172 Fed. 109, at 111 7th C. C. A.

Citing *Wilson v. Cattle Ranch Co. supra.*

Peters v. Bain, 133 U. S. 670.

In framing his counterclaim defendant elected to affirm the contract and recover damages for fraud and breach of warranty; and in laying his cause of action for damages for breach of warranty alleged that he had received and paid for a large quantity of the goods. Having thus alleged the original contract for sale and executed contract as a basis for his counter claim for damages he should not have been allowed to attempt to show by improper cross-examination of plaintiff's witness Goldstein that the original contract for sale had remained an executory contract and that no sale of the goods and no passing of title from plaintiff to defendant had ever taken place under that contract.

Notwithstanding the testimony of Goldstein, adduced on cross-examination over plaintiff's objection, whatever that testimony was, it should not have been available to defendant as showing the original contract for sale unexecuted, in view of the allegations of defend-

ant's pleading that the contract was an executed one and in the absence of any attempt to amend that pleading subsequent to defendant's discovery through such testimony (if there were such discovery) that defendant was mistaken, the contract had never become an executed one and defendant had not received and paid for a large quantity of the goods as he had alleged.

It may be contended that plaintiff was not prejudiced by the admission, at the trial, of the testimony of Goldstein on cross-examination objected to by plaintiff as plaintiff had abundant time between the taking of the depositions and the trial of the cause to recall Goldstein or call other witnesses, to correct any error in, or contravert, that testimony so objected to.

But there is no force to such contention because plaintiff could not be required to anticipate that the defendant would seek to rely upon testimony it had brought out from plaintiff's witness which contradicted and disproved the allegations of defendant's counter claim as to the original contract being an executed contract; which defendant must prove to recover damages alleged; on the contrary, plaintiff had a right to rely upon defendant offering evidence in support of his counter claim.

VII.

THERE IS YET ANOTHER REASON WHY THE TRIAL COURT WAS IN ERROR IN CONSIDERING

THE EVIDENCE COMPLAINED OF IN DETERMINING THE MOTION FOR NONSUIT, AND THAT REASON IS FOUND IN THE WELL ESTABLISHED RULE—

EVIDENCE, ALTHOUGH NOT OBJECTED TO, SHOULD BE DISREGARDED WHERE IT IS ADDRESSED TO NO ISSUE IN THE CASE.

The rule that there must be no variations between the pleadings and the proof applies equally to matters pleaded in defense and matters constituting the affirmative cause of action. The pleadings in the case at bar consisted of:

FIRST: The complaint, which alleged an action on an account stated in the ordinary form.

SECOND: The answer, which

(a) Denied generally the allegations of the complaint;

(b) set up the affirmative defense that the statement of the account had been induced by fraud on the part of the plaintiff in error.

THIRD: The reply, which denied the allegations contained in the affirmative defense of the answer.

An answer to a complaint on an account stated, setting up a general denial, puts in issue only the rendition of the account by the plaintiff and the acquiescence there-

in by the defendant. Any matter, such as omission, fraud or mistake, which would have the effect of impeaching the account, is an affirmative defense and must be specially pleaded. Authorities fully supporting this contention are cited in a prior part of this brief.

The only issues, therefore, on which evidence was competent, were:

FIRST: Was an account stated between the parties; and,

SECOND: Was the statement of the account induced by fraud on the part of the plaintiff in error? The evidence given by the witness Goldstein on cross-examination, which was objected to as not proper cross-examination and which has been previously summarized in this brief, was addressed to neither of these issues, but was manifestly adduced for the purpose of showing that no sale of goods had ever taken place; or, in other words, that the account was stated by the parties under a mistake as in the legal effect of the anterior transactions between the parties. There is no doubt that an account started may be impeached for mistake, but it is equally clear that to avail himself of such defense, the defendant must specially plead such mistake.

The answer in the case at bar apprises the plaintiff in error that the defendant in error would attack the statement of account on the ground of fraud, but con-

tains no allegation to inform the plaintiff in error, as it was entitled to be informed, that any attempt would be made to impeach the account for mistake. The evidence addressed to the issue of mistake was incompetent, and, although not objected to on the ground of its materiality, should have been disregarded by the trial court as not addressed to any issue in the case.

In

Texas & Pacific Railway Co. v. Johnson, 34 S. W. (Texas) 186,

an action was brought by an employee of the defendant to recover for personal injuries occasioned by the negligence of another employee of the defendant. The defendant set up certain acts of contributor ynegligence, and, on the trial of the case, introduced evidence of such negligence, and, in addition thereto, introduced evidence of an action of contributory negligence not pleaded, namely, the failure of the plaintiff to enter the time of departure of his train in the office of the train dispatcher. The court, in holding that this proof could not be considered in determining the question of contributory negligence, says (P. 191):

"The record shows that a rule of the defendant company required all conductors leaving Ft. Worth to register, in a book kept for the purpose in the train dispatcher's office, the time of their departure, and it was proven that the plaintiff, Johnson, failed to enter the time when he went out with his train; and defendant company contends, in its briefs, that this failure was contributory

negligence on the part of plaintiff. A charge was asked by defendant on the subject, to the effect that if he failed to register the time of his departure, and in so doing he did not exercise the care of a man of ordinary prudence, under the circumstances, and such failure contributed to proximately and directly to the production of his injuries that, but for such failure he would not have been hurt, the defendant would not be liable. This charge was refused by the court, and, I think, properly, because the defendant had (not) pleaded specially the contributory negligence of the plaintiff. The only acts of contributory negligence set up were in the plaintiff's failing to send back a flagman when he stopped his train to take water, and in failing to put out torpedoes on the track, as was required by the rules of the company; and his failure to register was not pleaded as an act contributing to his injury, and therefore was not an issue before the jury. The fact that the evidence was admitted, without objection, to prove the failure to register, did not supply the want of an allegation to support such proof."

Jewett et al., Commissioners, v. Sweet, 52 N. E. (Ill.) 962,

was a bill in chancery for injunction, restraining the appellants in their official capacity as commissioners of highways from cuttng a certain ditch and waterway through a highway and turnpike road upon which the farm of the appellee abuts. The bill sets out facts showing that the proposed change would irreparably injure his lands. The commissioners, in their answer, do not claim that the proposed change was necessary or that the construction of a bridge, which it was proposed to build over the waterway, would benefit the public or that the present bridge was in any way defective. In refusing to consider evidence introduced at the hearing on these points, the court said (P. 963):

"Some attempt was made by defendants to prove that the condition of the highway was such that this bridge was needed, or that to put in the new bridge would benefit the highway. The rule that a party cannot make one case by his pleadings, and a different case by his proofs, is applicable to a defendant as well as to a complainant. The defendant is bound to apprise the complainant, by his answer, of the nature of the case he intends to set up, and cannot avail himself of any matter of defense not stated in his answer, even though it appears in evidence.

Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232.

By filing an answer, the defendant submits to the court the case made by the pleadings.

Kaufman v. Wiener, 169 Ill. 596, 48 N. E. 479; *Holmes v. Dole,* Clarke, Ch. 71.

As the answer in this case does not assert any public necessity for the proposed bridge, nor that the highway will be improved thereby, complainant was not required to meet that defense, and defendants cannot ask a decree in their favor because of any evidence which they introduced on that subject."

Numerous other authorities in support of this rule might be cited, but the rule is so well established and its violation in the case at bar so plain that we do not believe further authority necessary.

VIII.

THE MOTION FOR A NONSUIT WAS IMPROPERLY GRANTED. THE EVIDENCE CONTAINED IN THE DEPOSITIONS OF PLAINTIFF'S WITNESSES PRIMA FACIE ESTABLISHED THE PLANTIFF'S CASE.

"A nonsuit should be denied where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations. . . . The proof must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged, and must be such that a rational mind can draw from it the conclusion that the fact exists."

Goldstone v. Merchants', etc., Co., 123 Cal. 625, 627, and cases there cited;

Freeso v. H. S. & L. Soc., 139 Cal. 392, 394;

Ferris v. Baker, 127 Cal. 520, 522;

Hercules Oil R. Co. v. Hocknell, 91 Pac. (Cal.) 341, 344.

Where different conclusions may be reasonably drawn by different minds from the same evidence the question is one for the jury.

Coprivisa v. Rilovich, 87 Pac. (Cal. App. 1st Dist.) 398.

"A nonsuit should be denied when there is any evidence tending to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence. (*Felton v. Millard,* 81 Cal. 540.)"

Zilmer v. Gerichten, 111 Cal. 73, 77;

Kramm v. Stockton El. R. R. Co., 3 Cal. App. 606, 609.

In *Estate of Arnold,* 147 Cal. 583, after stating, that the same rules apply to contests of wills as in ordinary civil cases in the matter of nonsuits, the court said (p. 586):

"Every favorable inference fairly deducible and every favorable presumption must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of the several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the conotestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." (Citing numerous cases.)

"A motion for a nonsuit admits the truth of plaintiff's evidence and every inference of fact which can be properly drawn therefrom, and the question thus presented is as strictly one of law as that which would arise, if, to a complaint alleging the same facts, a demurrer should be interposed upon the grounds that such facts were insufficient to constitute a cause of action."

Warner v. Darrow, 91 Cal. 309, 312;

Plass v. Plass, 121 Cal. 131, 136;

Wagner v. Wedell, 3 Cal. App. 274, 281.

In *Hanley v. California, etc., Co.*, 127 Cal. 232, the court en banc said (p. 237):

"The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant. (*Goldstone v. Merchants', etc., Storage Co.*, 123 Cal. 625.) This rule must be applied to all the evidence submitted by plaintiff."

Estate of Arnold, 147 Cal. 583, 590;

Wright v. Roseberry, 81 Cal. 87, 91;

Williams v. Hawley, 144 Cal. 97, 102;

Archibald Estate v. Matteson, 90 Pac. (Cal. App.) 3rd Dist.) 723, 725;

Kramm v. Stockton El. R. R. Co., 3 Cal. App. 606, 609;

Doyle v. Eschen, 89 Pac. (Cal. App., 3rd Dist.) 836, 837, and cases there cited.

"Where there is a conflict in the evidence, some of which tends to sustain the plaintiff's case a motion for a nonsut should not be granted. (*Pacific Mutual Life Ins. Co. v. Fisher,* 109 Cal. 566, 42 Pac. 154.)"

Kramm v. Stockton El. R. R. Co., 3 Cal. App. 606, 609;

Archibald Estate v. Matteson, 90 Pac. (Cal. App.) 723, 724;

Pacific Mut. Ins. Co. v. Fisher, 109 Cal. 567, 568.

"Such a motion (for a nonsuit) is in the nature of a demurrer to the evidence. The truthfulness of the testimony is admitted, but its sufficiency is challenged."

Butler v. Highland, 89 Cal. 575, 581;

Hopkins v. Railway, 34 S. W. 1029; (*passim*) 1036; s. c. 96 Tenn. 409, 437;

Doyle v. Eschen, 89 Pac. (Cal. App.) 836, 837;

Archibald Estate v. Matteson, 90 Pac. (Cal. App.) 723, 725.

In *Jones v. Adair,* 91 Pac. 78, the Supreme Court of Kansas said (pp. 78-9):

"The trial court may have discredited the testimony of the plaintiff, but the testimony offered in his behalf

could not be disbelieved and disregarded on a demurrer to the evidence. On that test every part of the testimony favorable to the plaintiff is deemed to be true, and every conclusion which it tends to prove is deemed to be admitted. *Christie v. Varnes,* 33 Kan. 317, 6 Pac. 599; *Buoy v. Milling Co.,* 68 Kan. 436, 75 Pac. 466."

The evidence introduced on the part of the plaintiff would have justified the jury in returning a verdict in its favor, and the court was, therefore, without authority to usurp the function of the jury by taking the case from them.

Holloway v. Railway Co., 130 Cal. 177, 179, 180;
Bush v. Barnett, 96 Cal. 202, 203, 205;
McCurrie v. Southern Pac. Co., 122 Cal. 558, 561-2;
Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 551-2;
Osgood v. L. A. Traction Co., 137 Cal. 280, 283.

IX.

THE COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR AN ORDER REQUIRING PLAINTIFF TO ELECT BETWEEN THE TWO CAUSES OF ACTION SET FORTH IN ITS ORIGINAL COMPLAINT.

The first cause of action in the original complaint was upon a balance due for goods, wares and merchandise sold and delivered by plaintiff to defendant; the second cause of action in that complaint was upon an account stated and an agreement in writing to pay.

These actions were not inconsistent with each other. The proof to sustain the second cause of action could consist of the proof to sustain the first cause of action together with the further proof of the stating of the account and the agreement to pay.

The proofs would be, not inconsistent, but cumulative; and no confusion could result which would prevent the jury from reaching a correct result.

The practice, pleadings and forms of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

Sec. 914, R. S. U. S.

This section applies to the rules of pleadings. Note to

Castro v. De Vriarte, 12 Fed. 250, citing:
Taylor v. Brigham, 3 Woods 377;
Lewis v. Gould, 13 Blatch. 216.

"The plaintiff may unite several causes of action in the same complaint when they all arise out of one contract, express or implied. . . ."

Sec. 4942 Ball. Washington Code.

Moylan v. Moylan, 49 Wash. 341.

The decision, upon a question of pleading in the state courts, is under the act of Congress (Sec. 914, R. S. U. S.), binding upon this court.

Taylor v. Brigham, Fed. Case 13,781.

"The sufficiency and scope of pleadings and the forms and effect of verdicts in actions at law, are matters in which the circuit courts of the United States are governed by the practice of the courts of the state in which they are held."

Glenn v. Summers, 132 U. S. 152.

The order requiring plaintiff to elect between its two causes of action was prejudicial to plaintiff.

The issues tendered by these two causes of action were distinct.

In the one on the stated account in addition to proof of the stating of the account and the agreement to pay, proof was only required of transactions of a monetary character sufficient to base an account stated upon.

In the cause for balance of an account for goods sold and delivered the proof would necessarily have to be full and complete as to such sale and delivery.

It is true that the nonsuit was granted on the remaining cause of action, on the account stated, on the ground that the evidence showed affirmatively that no sale or

delivery had taken place. But as we have argued above the evidence so showing was admitted over plaintiff's objection and under a state of pleadings when the original contract for sale was admitted as an executed one, and there was no issue between the parties on that question.

Had there been an issue raised by the pleadings as to the original contract for the sale of the goods becoming an executed contract at the date of such pleadings, the plaintiff would have been required to offer proof in support of its allegations in respect of the same.

But that such an issue would not have been raised by defendant is apparent from the allegations of the affirmative defenses and counter claim contained in defendant's answer.

When error occurs the presumption is that it is prejudicial.

In the case of *Railroad Company v. O'Brien et al*, 119 U. S. 99, the court, through Justice Harlan, say:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was admitted, it is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

And this court in *Gold Mining Co. v. Cheney*, 162 Fed. 593, at p. 600, cited approvingly *U. P. R. R. v. Field*, 137 Fed. 14, as follows:

"The presumption always is that error produces prejudice. It is only when it appears so clearly as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable." Citing a large number of cases.

X.

THE COURT ERRED IN ENTERING JUDGMENT OF DISMISSAL.

If our contentions as above set forth are correct, it necessarily follows that the court erred in entering judgment of dismissal.

We submit that, for the reasons above given, the judgment of the trial court should be reversed and the case remanded with directions to grant a new trial.

Respectfully submitted,

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